(36610) No. 517

LIBRARY
SUPREME COURT, U. S

IN THE

Supreme Court of the United States

October Term, 1961

SAVE WAY NORTHERN BLVD. INC.,
Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

MOTION TO DISMISS

LEO A. LARKIN,
Corporation Counsel,
Counsel for Appellee,
Municipal Building,
New York 7, N. Y.

SEYMOUR B. QUEL,
BEATRICE SHAINSWIT,
of Counsel.

JOHN F. DAVIS, CLERK
NOV 24 1961
FILED
Office-Supreme Court, U.S.

INDEX

	PAGE
MOTION TO DISMISS	1
THE LACK OF FEDERAL SUBSTANCE IN THE ISSUES PRESENTED BY APPELLANT	1
THE ORDINANCE INVOLVED	5
The Purpose of the Ordinance	5
The Original Enactment	6
The 1941 Amendment	7
COUNTER-STATEMENT OF QUESTION PRESENTED	8
ARGUMENT	9
Since the New York City ordinance patently constitutes a reasonable exercise of police power, the challenge thereto presents no substantial federal question	9
CONCLUSION	18

CITATIONS

Cases:

Breard v. Alexandria, 341 U. S. 622 (1951)	9
Fried v. Kervick, 34 N. J. 68, 167 A. 2d 380 (1961)	12
Gant v. Oklahoma City, 289 U. S. 98 (1933)	17
Hauge v. Chicago, 299 U. S. 387 (1937)	17

PAGE

Levy v. City of Pontiac, 331 Mich. 100, 49 N. W. 2d 80 (1951) 17

Nebbia v. People of State of New York, 291 U. S. 502 (1934) 13

People v. Arlen Service Stations, 284 N. Y. 340 (1940) 9
People v. Sav-4-On-Gallon, 204 Misc. 708 (Mag. Ct. Queens Co., 1953) 8
People v. 25 Stations, Inc., 3 NY 2d 488 (1957) 8

Semler v. Dental Examiners, 294 U. S. 608 (1935) 12
Serve Yourself Gasoline Stations Ass'n v. Brock, 39 Cal. 2d 813, 249 P. 2d 545 (1952), app. dism. 345 U. S. 980 (1953) 14
South Carolina Highway Dept. v. Barnwell Bros., 303 U. S. 177 (1938) 17
State v. Hobson, 46 Del. 381, 83 A. 2d 846 (1951) 13
Sun Oil Co. v. Director of Division on Necessaries of Life, 163 N. E. 2d 276 (Mass. 1960) 13

United States v. Carolene Products Co., 304 U. S. 144 (1938) 16

Other Authorities:

United States Supreme Court, Revised Rules, Rule 16 1

Administrative Code of the City of New York:
Section B 36-101.0, Local Law No. 141 of 1939 6
Section B 36-103.0, Local Law No. 56 of 1941 1, 5, 7

Proceedings of New York City Council:
1938: vol. 1, pp. 1351-3 6
vol. 2, pp. 54-167 6
1939: vol. 1, pp. 27, 84, 252, 745, 1696 6
vol. 2, pp. 9-10 6
1941: vol. 1, p. 1165 7

6 McQuillin, Municipal Corporations (3d ed.), Sec. 20.05, p. 12 15

IN THE

Supreme Court of the United States

October Term, 1961

SAVE WAY NORTHERN BLVD. INC.,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS

The People of the State of New York, pursuant to Rule 16 of the Revised Rules of this Court, move to dismiss this appeal from the final order of the New York Court of Appeals affirming defendant's conviction of violating Section B36-103.0 of the New York City Administrative Code, on the ground that no substantial federal question of any kind has been raised.

Reported below: 10 NY 2d 727, 176 N. E. 2d 839.

The Lack of Federal Substance in the Issues Presented by Appellant

The ordinance at bar, as amended in 1941, regulates the nature and location of the gasoline price signs that New York City gas stations may post, and bars all nonconforming signs "referring directly or indirectly to the

price" of gasoline. New York's highest court affirmed the finding of the two courts below that appellant's signs—far exceeding the statutory limitations, and bearing the words "Save Way", with the "Save" placed horizontally and superimposed above the vertical "Way" underneath—referred indirectly to the price of gas, and thus were in violation of the ordinance.

(a) Despite the fact that three courts have now resolved this factual question against appellant, the latter still seeks to generate here an issue as to whether its signs refer to price.

The courts below found, however—and indeed appellant conceded—that the name "Save Way" was deliberately and artificially coined in 1951; has no basis in any special method of selling or producing the gasoline; is not the name of the refinery that supplies the gasoline, the parent corporation of the chain, the gasoline bought by the chain, or the company that barges or delivers the gasoline; and is not a registered trade name or trade mark (Court of Appeals Record, 117-134).

The courts accordingly concluded that the name "Save Way", and the lurid signs artfully arranging the name to emphasize the "Save", could have no other purpose but to attract the passing motorist with the exhortation that in this station he would find a way to save—i.e., lower prices. Since the ordinance was enacted precisely to end competition via price posters—the New York City legislative body having found that such poster competition among gasoline stations created an inexorable temptation to fraud and deception, and having then amended the statute

specially to bar indirect as well as direct references to price, because of just such circumventions as appellant's—the conviction of violation was upheld, without opinion, by New York's highest court.

(b) In view of this incontestable finding of violation, appellant here has been forced to resort primarily to a broadside attack on the constitutionality, not merely of New York City's ordinance, but of all the scores of "statutory restrictions on the size and location of price signs at gasoline stations" throughout the country (Appellant's Statement, p. 3).

In other words, having been defeated in its attempt to outwit and evade New York's restrictions, appellant now seeks to destroy them. It is undeterred by the fact that New York's statute was held constitutional by the New York Court of Appeals a full 21 years ago. Nor does it evince concern that, in passing on appellant's device to evade that statute, neither the convicting Magistrate, the three-man intermediate court, nor a single one of the seven judges of the Court of Appeals indicated a shadow of a doubt as to the validity of the ordinance; or that the single dissenting Judge in the Court of Appeals made plain that he differed solely on the factual question of whether appellant's signs referred to price, and that he did not question for a moment the conclusion of his colleagues that the ordinance was wholly constitutional.

We will establish that the ordinance—in view of the obvious evil being met and the reasonableness of the means adopted by the legislature to deal with that evil—was patently constitutional, within all the long-settled tests

thereof. Certainly, when together with this there is considered the untroubled enforcement of this ordinance for 22 years, and the unanimous rulings of the three courts below, the utter insubstantiality of any federal issue here becomes, we believe, most evident.

(c) Nor has appellant introduced any true new question with its secondary claim that its particular circumvention of the ordinance—the clever embodiment of the reference to price in its specially created trade name—somehow gives it property rights walled in against all State regulation. No one compelled appellant, years after New York enacted this statute, to choose a name in deliberate violation thereof [1]; having done so, and been caught, appellant is hardly in a position to demand this Court's aid. The only significance in the fact that "Save Way" was a trade name is that appellant chose that form for its scheme to circumvent the ordinance. That scheme has been blocked; appellant cannot now fall back on it to claim special "property rights" in its "tradename" which other, less astute, violators lack.

---

(1) The ordinance was enacted in 1939; the name "Save Way" was first created by appellant's parent company in 1950, as the name under which the chain of 17 gas stations would thereafter sell its gasoline (Record, 122-3); appellant corporation was organized in 1955 to operate the chain's first New York City station (Record, 88) (the only other New York City station was established in 1959, after the chain was on notice of the challenge to its signs—Record, 89). Thus the name was not used in New York City until the ordinance had been on the books for 16 years.

The Ordinance Involved

The Purpose of the Ordinance

Section B36-103.0 of the Administrative Code of the City of New York is printed at page 4 of appellant's Statement as to Jurisdiction. We need not ourselves describe the evil which the legislature sought to combat in enacting it; appellant has done that for us very well, in its reply brief herein in the New York Court of Special Sessions, where it said (pp. 7-9):

> "The Court will take judicial notice of the fact that prior to the enactment of the ordinance involved, gasoline stations in New York and elsewhere were in the habit of posting large signs indicating the price at which gasoline was being sold in order to entice—very often misleadingly—the passing motorist.
>
> A common practice still in vogue in Nassau and other counties is to display signs having large figures to which is added '.9' in tiny figures so as to suggest that the price of the gasoline is, for example, 27¢, whereas, in fact it is 27.9¢.
>
> Another device employed by the unscrupulous gasoline station owner is to have a large sign containing, let us say, the figures 24¢. When the motorist drives into the station, he discovers that instead of gasoline being sold at 3¢ below the prevailing price (27¢) in the area, the 24¢ refers to a quart of oil while gasoline would be 29¢ or 30¢ a gallon. It is this sort of practice that the ordinance was designed to eliminate.
>
> We subscribe to the City's language in describing the purposes of the ordinance as stated early in its brief. * * * It was, says the City,

"• • • designed to eliminate various deceptive practices which had arisen in the retail gasoline industry. In particular, it imposed severe limitations on the placards posted at a gas station to advertise prices. A primary motivation for the measure appears to have been community outrage over bold and huge signs, widely used by dealers at the time, which enticed passing motorists by giving confusing or even false impressions as to the price charged for gasoline, particularly through claims of savings and discounts. By prohibiting all but small, informative price notices, the Legislature sought to eliminate the temptation to fraud and deception endemic in competition via price posters.' "

The Original Enactment

The provisions quoted by appellant constitute only a portion of the comprehensive legislation originally enacted in 1939 by New York City in regard to these service station vending practices. The bill was sponsored by the City Department of Markets. It was a product of the most careful deliberation for well over a year; a public hearing was held; continual revisions were made, with repeated Reports to the City Council by the committee in charge of the bill; the fullest consideration was had, both on the original draft and on the final bill as amended to cover all objections. The ultimate enactment, L. L. 141 of 1939 (N. Y. C. Admin. Code, Sec. B36-101.0), was designed to require "• • • the posting of retail prices to prohibit misbranding and adulteration and for other purposes on gasoline and motor oils." (See Proceedings of New York City Council, 1938—v.1, pp. 1351-3, v. 2, pp. 54-167; 1939—v.1, .7, 84, 252, 745, 1696, v.2, pp. 9-10).

To carry out this design, *inter alia*, the sale of gasoline was permitted only if a sign was posted, directly on the pump, stating clearly and legibly and in figures of uniform size the price, brand, and grade. Such signs were required to be large enough to be read without the slightest difficulty —at least 7 inches high by 8 inches wide—but not so large that dealers would be tempted to seek to attract passing motorists with cleverly printed deceptions—i.e., no more than 12 inches high by 12 inches wide. Finally—and obviously—all other price signs were barred.

The 1941 Amendment

Two years later, when experience with the law had demonstrated the various artful guises evasion of the legislative policy could take, the ordinance was again amended, after additional legislative hearings, to its present language [L. L. 56 of 1941—N. Y. C. Admin. Code, Sec. B36-103.0]. *Inter alia*, the original language barring nonconforming signs "stating the price" of gasoline was changed to bar all signs "stating or referring directly or indirectly" to that price. In this connection, the Committee on General Welfare of the City Council, on whose recommendation the amendment was enacted, reported on June 17, 1941 (New York City Council Proceedings, v. 1, p. 1165):

> "That the original law enacted to correct certain evils in this business met with general public approval. Unfortunately, however, unscrupulous dealers thereafter adopted devious means to circumvent the provisions. This bill will further protect and clarify the situation, and we recommend its enactment into law."

It was this amended language—designed precisely to strengthen the statute by ending devious circumventions of its objectives—that appellant's sign was found to violate. It was not the only such attempt at evasion; typical of a number of others struck down by the New York courts, all evidencing that the danger feared by the City Council was entirely real, was *People* v. *25 Stations, Inc.*, 3 NY 2d 488 (1957), where a chain of gas dealers incorporated themselves as "25 Stations, Inc.," and then posted outsize signs "Owned and Operated by 25 Stations, Inc." with the "25" in much bigger print than the other words; their gasoline was sold at 24.9¢ a gallon. There, as with "Save Way", the courts saw through the attempt to circumvent the ordinance, and upheld the finding that an indirect reference to price was patently involved. See also *People* v. *Sav-4-On-Gallon, Inc.*, 204 Misc. 708 (Mag. Ct. Queens Co., 1953).

In this setting and on this record, we submit what we conceive to be the true issue before this Court.

Counter-Statement of Question Presented

Where a State has found that appellant deliberately conceived its trade name to have it serve as an exhortation concerning price and that this artifice flouts the legislative objective of frustrating fraud on the consumers, is the State powerless to vindicate its policy and to prosecute a cunning violator because the violator asserts that his artifice is enshrined as a brand name and is protected as a property right against any legislative regulation, and is this tenuous assertion of such substantiality as to warrant review by this Court?

ARGUMENT

Since the New York City ordinance patently constitutes a reasonable exercise of police power, the challenge thereto presents no substantial federal question.

(a) That a municipality may regulate marketing and advertising practices in the public interest—even where this involves prohibiting exercise of a legitimate occupation, let alone restricting merely the type of advertisement which may be used—is of course, as appellant concedes (Statement, p. 10), well-settled. *Breard v. Alexandria*, 341 U. S. 622, 632-3 (1951) (upholding local ordinance prohibiting all door-to-door soliciting without each individual homeowner's consent).

Nor does it matter that appellant's particular infringements of local law have no fraudulent intent or consequence. In this connection we can do no better here than quote the extensive constitutional discussion by the New York Court of Appeals when it upheld this very ordinance 21 years ago [*People* v. *Arlen Service Stations*, 284 N. Y. 340, 343-4 (1940)]:

> "Section B36-101.0 of the Administrative Code * * * bears upon its face clear indication that it was designed to prevent fraud in the retail sale of gasoline. In our present inquiry, however, we may not give weight to the fact that fraud was neither charged nor proved against the defendant. A business, however honest in itself, may be the subject of governmental regulation if it may become a medium of fraud. 'It is not enough to say that the business may be honestly conducted.' (*People* v. *Beakes Dairy Co.*, 222

N. Y. 416, 427.) Nor may we extend the field of our judicial inquiry into the realm of expediency where legislative judgment alone dictates the necessity for statutory regulation and its wisdom.

The defendant asserts that the law here in question is an improper exercise of police power and violates the due process clauses of the Federal Constitution (Fourteenth Amendment) and the Constitution of New York, Art. I, §6). But we know that 'A reasonable regulation governing the use of property offered for sale so as to prevent fraud, does not destroy that property nor deprive the owner of its use in a constitutional sense.' (*People* v. *Luhrs*, 195 N. Y. 377, 383.) We also have in mind the rule that 'A legitimate public purpose may always be served without regard to the constitutional limitations of due process and equal protection.' (*People* v. *Perretta*, 253 N. Y. 305, 309; *People ex rel. Durham Realty Corp.* v. *La Fetra*, 230 N. Y. 429; *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63.)"

The tests of constitutionality, as the Court of Appeals pointed out, are (pp. 344-5):

"From the arguments of counsel we understand that, as in a case before this court more than fifty years ago, which involved the adulteration of food products, so today when we consider a local regulatory measure which governs the retail sale of gasoline, 'Ingenuity keeps pace with greed, and the careless and heedless consumers are exposed to increasing perils.' (*People* v. *Kibler*, 106 N. Y. 321, 324.) Those perils, including the exceptional facilities which the retail sale of gasoline affords for imposition upon the public, are not, however, a matter for our consideration. We may assume they were the subject of investigation and study by the City Council during its consideration of

the necessity for and wisdom of the local law in question. Our inquiry goes only to the reasonableness of the resulting enactment.

It cannot be said of this local legislation that it impairs the defendant's freedom to determine the price at which it will sell the gasoline which it offers to the public, nor does it prohibit the defendant from advertising that price. True, there are restrictions as to the location and size of the sign which the City Council has determined must be posted upon each pump as a means of imparting to customers information upon factors which enter into each retail sale of motor fuel —the sale price per gallon of the gasoline to be delivered at each pump; the amount of governmental tax to be collected in connection with the sale; the trade name, if any, by which the gasoline is marketed and the grade or quality by which it is classified. Likewise a restriction is made effective by the prohibition against the posting upon the premises of any other sign which states the price or prices of gasoline sold."

None of these restrictions in any way, the Court held, deprived appellant of its property without due process, for (p. 345):

"Restriction is implicit in police power however exercised. The problem is to ascertain whether the restriction, as an incident to the accomplishment of the legislative purpose, is reasonable in degree. We have said that 'Any trade, calling or occupation may be reasonably regulated if "the general nature of the business is such that unless regulated many persons may be exposed to misfortunes against which the Legislature can properly protect them."' (*Biddles, Inc.* v. *Enright*, 239 N. Y. 354, 363.) In the present instance we do not regard the restriction as to the placement, size or limitation of signs, or the require-

ment of a uniformity in size of the retail sale price figures thereupon, as being more drastic than is reasonable to accomplish the end for which the law was adopted."

[See also *Semler* v. *Dental Examiners*, 294 U. S. 608, 612-613 (1935), reviewing and upholding the public policy considerations which support legislation aimed at price references in connection with the furnishing of particular services—or, as in our case, the furnishing of gasoline.]

(b) Appellant's citation of decisions in other jurisdictions is not only beside the point but actually self-defeating. The very existence of these other statutes underscores the widespread character of the problem to which the New York City Council had addressed itself. Secondly, these foreign cases involve innumerable substantive differences in factual patterns, statutory drafting, and the state constitutions themselves; the resulting judicial attitudes naturally vary just as widely. The validity of New York City's particular approach—and whether this challenge thereto presents any substantial federal question—patently cannot be affected by any of those rulings.

Appellant's attempt to make much of the handful of conflicting decisions was most effectively disposed of just a few months ago by the highest court of New Jersey, in a decision which, despite appellant's hasty attempt to dismiss it (Statement, p. 9), undoubtedly constitutes the most comprehensive discussion on this subject. In *Fried* v. *Kervick*, 34 N. J. 68, 167 A. 2d 380 (1961), a far more stringent law than ours was upheld—a law actually forbidding the lowering of gasoline prices below the posted prices. The Court there, in pointing out how outdated was the concept that a state could not regulate gasoline prices (let alone

signs) cited this Court's holding in *Nebbia* v. *People of State of New York*, 291 U. S. 502, 537 (1934):

> "• • • with respect to the requirement of due process that a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to effectuate that policy by legislation reasonably adapted to that purpose; also that 'if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise' " (167 A. 2d at 383).

With specific reference to our problem, the Court continued (167 A. 2d at 384):

> "Although the issue has not been raised here, we note that in other states a requirement for posting of signs stating the sale price of gasoline has been upheld. Serve Yourself Gasoline Stations Ass'n v. Brock, 39 Cal. 2d 813, 249 P. 2d 545 (Sup. Ct. 1952), State v. Hobson, 7 Terry 381, 46 Del. 381, 83 A. 2d 846 (Sup. Ct. 1951)(2); State v. Woitha, 227 Iowa 1, 287 N. W. 99, 123 A. L. R. 884 (Sup. Ct. 1939); People v. Arlen Service Stations, supra; Merit Oil Co. v. Director of Division of Necs. of Life, 319 Mass. 301, 65 N. E. 2d 529 (Sup. Jud. Ct. 1946)(3); State v. Guyette, 81 R. I. 281,

---

(2) The single provision not held valid by the Delaware court in the above-cited *State* v. *Hobson*, to which appellant seeks to transfer our attetnion (Statement, p. 9), set a maximum of 4 inches by 6 inches on all signs, with no minimum—a limitation so very special as to make plain the inapplicability of all these varying cases to the particular statute and fact pattern in New York.

(3) Appellant's statement (Statement, p. 9) as to *Sun Oil Co.* v. *Director of Division on Necessaries of Life*, 163 N. E. 2d 276 (Mass. 1960), is quite misleading; the signs advertising "thrift" there were held not to be barred by the Massachusetts statute because those very signs gave the full basis for the claim of thrift—the special blending process used, peculiar to that appellant, and of course not claimed by the instant one. The *Merit Oil Co.* decision, properly cited by the New Jersey court as being in accord with the New York rule, remains the law of Massachusetts.

102 A. 2d 446 (Sup. Ct. 1954); Annotation 131 A. L. R. 1266 (1941). The reason for the holding is that the mandate represents a proper legislative effort to control the practice of deception and fraud upon the public with respect to the price charged for gasoline."

• • •

"The New York Court of Appeals in People v. Arlen Service Stations, supra, regarded the price display requirement as a reasonable regulation governing the use of property offered for sale so as to prevent fraud and imposition on the public. Regal Oil Co. v. State, supra [123 N. J. L. 456, 10 A. 2d 495], appears to be to the contrary. * * * [However, *inter alia*, it was] decided without regard to Nebbia v. People of State of New York and Olsen v. State of Nebraska, supra [313 U. S. 236], which we regard as expressive of more appropriate constitutional doctrine."

We submit that appellant's broadside challenge (Brief, p. 8) to "the constitutionality of statutes and ordinances prohibiting the display of gasoline price signs except those of limited size on pumps" merits the same disposition—dismissal for want of a substantial federal question—as was meted out to the appeal in the similar case of *Serve Yourself Gasoline Stations Assoc.* v. *Brock*, 39 Cal. 2d 813, 249 P. 2d 545 (1952), app. dism. 345 U. S. 980 (1953). There the California Legislature had attacked the same problem of misleading gasoline station advertising, not by limiting stations to clearly worded signs on pumps—as New York City and a number of other cities and states have done—but by infinitely detailed prescription as to the content, size of lettering, design and print used on signs—including requirements that numerals be no more than twice the size

of letters, that the height of letters be no more than twice the width, etc. The California court, noting that this was a different approach from that of barring signs big enough to lure passing motorists, ultimately held simply that the legislation was a reasonable means of dealing with the problem. This Court dismissed the resulting appeal "for the want of a substantial federal question." (345 U. S. 980).

The fact that New York City chose a different method of dealing with this problem obviously cannot raise a substantial federal question either, this Court having found that none existed in the California case. Appellant is simply differing with the wisdom of New York's approach. Since that approach is obviously reasonably related to the legislative purpose, the fact that California's approach (enacted 10 years after New York's, and undoubtedly with an eye to the experience with legislation like this all over the country) may be considered by appellant, or by the California court—or even by this Court—to be a wiser approach, is of course totally irrelevant. 6 McQUILLIN, *Municipal Corporations* (3d ed.) Sec. 20.05, p. 12.

We might add that New York City might reasonably have considered its own approach preferable to the California one, if for no other reason, simply because of the possibility that motorists reading large signs might have their attention distracted from the road. Whatever the merits of this view, it was obviously just the kind of question that was of concern to the legislative body, and *not* to this Court.

(c) We turn now to appellant's repeated insinuations (Statement, pp. 3, 5, 7, 12) that New York City's ordinance

was designed to serve "the monopolistic interests of the large gasoline companies" (Statement, p. 7). We challenge appellant to indicate, with appropriate citations, where it finds the slightest support in the record for these statements. For that matter, appellant nowhere explains how its insinuations supplant the settled principle that legislative motive is not open to judicial scrutiny.

Indeed, appellant, part of a corporate complex that owns 17 gasoline stations, 15 terminals, a refinery and ocean-going tankers (Record, 128-9), should be the last to raise this complaint. We call to the Court's attention that the gasoline sold by this syndicate—by its own admission (Record, 123)—came, until 1959, from the same large oil corporations it now attacks. In other words, for at least four years after it started using the name "Save Way" in New York City, it was marketing under that name the gasoline of major oil companies. Appellant is therefore telling this Court that New York's ordinance is invalid because it accords the same treatment to service stations selling nationally advertised brands under their proper names, as it does to stations selling the same brands under other names, artfully designed to incorporate a reference to price saving.

We need hardly point out that all this, apart from its absurdity, goes once again to the wisdom of the legislation and not to its validity. Whether or not better methods of dealing with all of these problems might have been conceived by the New York City legislative body, what it did do was, to say the least, far from arbitrary. In such a situation the courts have no concern. *United States* v.

Carolene Products Co., 304 U. S. 144, 154 (1938); *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 191 (1938); *Hauge* v. *Chicago*, 299 U. S. 387, 392 (1937); *Gant* v. *Oklahoma City*, 289 U. S. 98, 102 (1933).

We note also appellant's sudden discovery (p. 12) that "most of the cases" attacking state regulation of deceptive gasoline station advertising involved "independent dealers whose prices were lower than those of dealers selling nationally advertised brands". First of all, the fact is that most of the cases involve no such thing—it will be observed that no citations accompany this remarkable statement. On the contrary, in at least one case cited by appellant (Statement, p. 8)—*Levy* v. *City of Pontiac*, 331 Mich. 100, 49 N. W. 2d 80 (1951)—the city had argued that the law should be upheld because (49 N. W. 2d at 82) "it *prevents* small gasoline station operators from being squeezed out as a result of monopolistic practices" (Emphasis added).

Beyond all this, we find very interesting appellant's implicit admission, in making this statement, that its price for gasoline is lower than others. Throughout the courts below appellant fought (see, e.g., Record, 50-51, 72, 146-150) every attempt by the City to establish just that fact—since, of course, it would have helped establish the City's contention that "Save Way" was an unworthy contrivance to circumvent the ban on outsize signs advertising price; through the use of this alleged brand name, appellant was enabled, unlike its competitors, to announce its lower price to passing motorists by advising them that here they would find a way to save.

The three New York courts, even without the benefit of knowing that appellant's prices were lower, saw through its violation of the ordinance, and re-affirmed all their prior holdings that the ordinance was a reasonably conceived way of dealing with the danger of deceptive gasoline station advertising. Nothing now raised by appellant indicates the slightest reason for burdening this Court with one more application of the long-settled doctrines as to municipal police power.

Conclusion

It is respectfully submitted that appellant has presented no substantial question for resolution by this Court. The appeal should be dismissed.

November 22, 1961.

Respectfully submitted,

LEO A. LARKIN,
Corporation Counsel,
Counsel for Appellee,
Municipal Building,
New York 7, N. Y.

SEYMOUR B. QUEL,
BEATRICE SHAINSWIT,
of Counsel.